1998

State of Utah v. Samuel Enricque Bracero, Arturo Ruiz : Petition for Rehearing

Utah Court of Appeals

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Jere Reneer; Attorney for Appellee.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellant,	:	Case No. 981529-CA
v.	:	
SAMUEL ENRICQUE BRACERO, ARTURO RUIZ,	:	Priority No. 2
Defendants/Appellees.	:	

PETITION FOR REHEARING

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH	:	
Plaintiff/Appellant,	:	**Case No. 981529-CA**
v.	:	
SAMUEL ENRICQUE BRACERO, ARTURO RUIZ,	:	**Priority No. 2**
Defendants/Appellees.	:	

PETITION FOR REHEARING

ARGUMENT

On 2 December 1999, this Court issued the memorandum decision in this case, *State v. Bracero and Ruiz,* Case No. 981529-CA (Utah App. December 2, 1999) ("decision," attached as addendum A), affirming the trial court's suppression of the evidence and dismissal of charges of possession of marijuana, a third degree felony, driving on a suspended license, a class C misdemeanor, and speeding, a class C misdemeanor. The determinative issue is whether the trial court correctly ruled that Trooper Metz improperly detained defendants beyond the traffic purpose for the stop.

On appeal, this Court reviewed the trial court's ruling granting defendant's motion to suppress and stated the following:

> In this case, the trial court specifically found the "only facts . . . actually observable by . . . [the trooper] at the time he made his decision are the smell of air freshener and the fact that neither occupant was the registered owner of the car." The State does not dispute these factual

findings, and therefore, we accept them as true.

Bracero, slip op. at 2.

The above paragraph, while technically accurate, is misleading because it ignores the trial court's additional undisputed factual findings regarding the trooper's knowledge, the most critical of which is that defendant Ruiz had a history of drug smuggling (R. 151), add. B.[1] *See also* Aple. Br. at 5 ("[Trooper] Metz received the criminal history of both defendants. Mr. Ruiz has a prior drug conviction in California, and Mr. Bracero has assault and larceny charge on his record.").

The Court's confusion may have been caused by the fact that there are three different rulings by the trial court concerning defendant's motion to suppress.[2] This Court quotes from the trial court's initial Ruling (R. 75-71), add. B. But the initial Ruling was followed five months later with more specific Findings of Fact and Conclusions of

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[1] The Fourth Amendment does not require that the reasonable suspicion matrix be based solely upon observable facts. *See State v. Lopez*, 873 P.2d 1127, 1132 (Utah 1994) ("An observed violation, however, is not required. Stopping a vehicle may also be justified when the officer has 'reasonable articulable suspicion . . .'"). *See also State v. Shephard*, 955 P.2d 352, 355 (Utah App. 1998) ("The reasonable suspicion must be 'based on specific, articulable facts drawn from the totality of the circumstances facing the officer at the time. . .'"). Here, the smell of air freshener and the fact that neither defendant was the registered owner of the car were arguably the only "observable" facts, but they were not the only "articulable" facts. Indeed, as noted above, the trooper testified and the and the trial court found that Ruiz had a history of drug smuggling (R. 151), add. B.

[2]The pertinent rulings are contained in Addendum B.

Law (R. 152-150), add. B.[3] This latter document represents the trial court's last word concerning this case and includes specific findings that:

- Trooper Metz both observed air freshener in defendant's vehicle and also detected a strong odor of air freshener emanating from therein (R. 152), add. B.
- Both defendants had criminal histories and codefendant Ruiz had been previously arrested for drug smuggling (R. 151), add. B.
- Neither defendant was lawfully entitled to drive the vehicle (R. 151), add. B.
- Both defendants were nervous and neither defendant would make eye contact with the trooper (R. 151), add. B.

Additionally, even in its initial Ruling to which this Court cites, the trial court acknowledged that both defendants had criminal histories (R. 72), add. B.[4] Finally, the relevant record, attached as addenda A-H to the State's opening brief, amply supports these findings.[5] Thus, the *Bracero* decision fails to acknowledge *all* of the undisputed

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[3]The trial court also issued a cursory ruling denying the State's Objection to its initial Ruling (R. 97).

[4]The trial court explained that it discounted the defendants' criminal histories on the ground that it did not establish that either defendant was "involved in criminal activity at this time" (R. 72), add. B. However, the trial court's reasoning in this regard contravene's *State v. Humphrey*, 937 P.2d 137, 143 (Utah App. 1997), where this Court held that criminal history properly contributes to the reasonable suspicion matrix. *See* Aplt. Br. at 21 and Reply Br. of Aplt. at 7.

[5]The trial court discounted the trooper's additional observations of maps, a cell phone, and gapped molding (R. 151-150), add. B. For reasons stated in its opening brief, the State disagrees with the trial court's rulings in this regard. Aplt. Br. at 19 n.6 However, as will be explained, the trooper's observation of these factors are not critical to

factual findings entered below.

Further, the failure to acknowledge all of the factual findings and undisputed facts substantially adversely affected the result in this case. While it is true that the smell of air freshener alone cannot provide a reasonable suspicion that drugs are present, *Bracero*, slip op. at 2, the strong smell of air freshener *together* with defendant Ruiz's undisputed history of drug smuggling is sufficient to establish reasonable suspicion. *See* Aplt. Br. at 17 (citing *United States v. Hernandez-Rodriguez*, 57 F.3d 895, 898 (10th Cir. 1995) (reasonable suspicion established based on use of masking agent and computer hit indicating that defendant had previously been referred to Customs for zero tolerance drugs); *United States v. Stone*, 866 F.2d 359, 362 (10th Cir. 1989) (reasonable suspicion established based on use of recognized masking agent and DEA computer indication that defendant was involved in drug trafficking)). *See also* Reply Br. of Aplt. at 5-6 (citing *United States v. Ledesma-Dominguez*, 53 F.3d 1159, 1161 (10th Cir. 1995) (absence of personal identification, together with defendant's nervous behavior and presence of masking odor established reasonable suspicion); *United States v. Finke*, 85 F.3d 1275, 1280 (7th Cir. 1996) (defendant's suspicious behavior and criminal history including two prior drug convictions constituted reasonable suspicion for detention); *United States v. Pollington*, 98 F.3d 341 (8th Cir. 1996) (odor of masking agent, together with defendant's

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the issue here and the State therefore places no reliance upon them in arguing that reasonable suspicion was otherwise established.

suspicious story and visibly nervous conduct sufficient to establish reasonable suspicion); *People v. Easley*, 680 N.E.2d 776, 780 (Ill. App. 1997) (marijuana leaf decoration in defendant's wallet, together with defendant's visible nervousness, suspicious behavior, and prior drug conviction established reasonable suspicion), *cert. denied*, ___ U.S. ___, 119 S.Ct. 1144 (1999); *State v. Armstrong*, 659 N.E.2d 844, 847 (Ohio App. 1995) (high crime area and suspicious nature of defendant's activity in huddling with a group with hands moving within the tight group, together with defendant's history of drug offenses, created reasonable suspicion)). The additional undisputed facts that neither defendant could lawfully drive the vehicle, neither defendant would make eye contact with the trooper, and that the stop occurred on a known drug-route (I-15), *see State v. Poole*, 871 P.2d 531, 534 n.1 (Utah 1994), heighten an already reasonable suspicion of drug trafficking. *See* Aplt. Br. at 16-18 and Reply Br. of Aplt. at 6-9. Thus, applying the above law to the entirety of the factual findings entered here, e.g., the strong odor of air freshener, Ruiz's history of drug smuggling, both defendants' refusal to make eye contact, and the known drug route location of the stop, reasonable suspicion is clearly established. This Court should grant the petition for rehearing to fully consider *all* of the undisputed factual findings entered below.

Secondarily, the Court's reasonable suspicion analysis does not dispose of this case. *See Bracero*, slip op. at 3 ("We do not address the State's remaining arguments because of our holding concerning lack of reasonable articulable suspicion."). Indeed,

Lopez, makes plain that only "investigative questioning that *further* detains the driver must be supported by reasonable suspicion of more serious criminal activity." 873 P.2d at 1132 (emphasis added).

As set forth in the State's opening and reply briefs, the trooper's request to search did not further detain defendants within the meaning of *Lopez*. This is so because, as found by the trial court, neither defendant could lawfully drive (R. 73), add. B; (R. 151), add. B. *See also* Aplt. Br. at 12-15; Reply Br. of Aplt. at 1-4. Defendants have not, and cannot challenge this finding as clearly erroneous. *See* Aple. Br. at 12 (acknowledging that "the State could have detained and arrested the Defendants for traffic violations[.]"). *Cf. State v. Moosman*, 794 P.2d 474, 475 (Utah 1990) ("When challenging the findings of fact of the trial court on appeal, the [challenging party] must show that the findings of fact were clearly erroneous.").

Precisely because neither defendant could lawfully drive, any detention engendered by the trooper's request to search was justified as incident to the ongoing traffic purpose of the stop. Reply Br. of Aplt. at 1. Whether the trooper *also* reasonably suspected defendants were smuggling drugs is immaterial. *Lopez*, 873 P.2d at 1132.

CONCLUSION

Based on the above, this Court should withdraw its decision affirming the suppression ruling below and issue a revised decision that conforms to *all* of the trial court's undisputed factual findings and to controlling authority. The revised opinion

should therefore reverse the lower court on the ground that further detention, if any, was justified.

RESPECTFULLY SUBMITTED on 15th December 1999.

JAN GRAHAM
Utah Attorney General

MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I certify that on 15th December 1999, I caused to be mailed, by U.S. Mail, postage prepaid, two accurate copies of this *PETITION FOR REHEARING* to:

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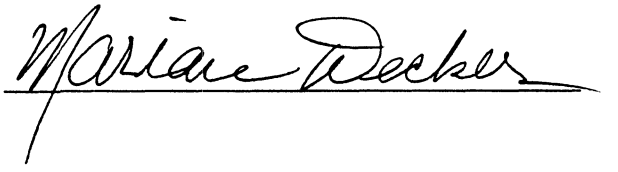

Addenda

Addendum A

IN THE UTAH COURT OF APPEALS

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State of Utah, Plaintiff and Appellant, v. Samuel Bracero and Arturo Ruiz, Defendants and Appellees.	MEMORANDUM DECISION (Not For Official Publication) Case No. 981529-CA F I L E D (December 2, 1999) 1999 UT App 351

Fourth District, Nephi Department
The Honorable Anthony W. Schofield

Attorneys: Jan Graham and Marian Decker, Salt Lake City, for Appellant
Jere Reneer, Spanish Fork, for Appellee Bracero
Alan Dayton, Salt Lake City, for Appellee Ruiz

Before Judges Wilkins, Billings, and Davis.

WILKINS, Presiding Judge:

The State appeals the trial court's order of dismissal based on defendants Samuel Bracero and Arturo Ruiz's successful motion to suppress for lack of reasonable suspicion. The trial court upheld the validity of the initial stop, but concluded that the subsequent detention of defendants exceeded the scope of the stop and was therefore illegal. We affirm.

In reviewing a challenge to a trial court's suppression ruling, we will not reverse the factual findings underlying that ruling unless they are clearly erroneous. See State v. James, 858 P.2d 1012, 1014 (Utah Ct. App. 1993). However, "whether a specific set of facts gives rise to reasonable suspicion is a determination of law and is reviewable nondeferentially for correctness . . . [with] a measure of discretion [given] to the trial judge when applying that standard to a given set of facts." State v. Pena, 869 P.2d 932, 939 (Utah 1994).

In determining whether a search is constitutionally reasonable, we examine whether: (1) the trooper's action was justified at its inception; and (2) whether the resulting

detention was reasonably related to the circumstances justifying the initial stop. See State v. Lopez, 873 P.2d 1127, 1131-32 (Utah 1994). Once the investigation based on the initial stop of the vehicle has been completed, the occupants must be allowed to proceed on their way. See State v. Robinson, 797 P.2d 431, 435 (Utah Ct. App. 1990). "Any further temporary detention for investigative questioning after the fulfillment for the purpose of the initial traffic stop is [un]justified . . . [unless] the detaining officer has a reasonable suspicion of serious criminal activity." Id. Defendants concede the trooper was justified in making the initial stop because he observed defendants' car speeding. Therefore, we focus on whether the officer had a reasonable articulable suspicion of criminal activity justifying further detention of the defendants.

In this case, the trial court specifically found the "only facts . . . actually observable by . . . [the trooper] at the time he made his decision to [further] detain the vehicle and which support the decision are the smell of air freshener and the fact that neither occupant was the registered owner of the car." The State does not dispute these factual findings, and therefore, we accept them as true. See C & Y Corp. v. General Biometrics, Inc., 896 P.2d 47, 52 (Utah Ct. App. 1995) ("Because appellants do not challenge the trial court's factual findings, we must accept this finding as true.").

Although the smell of air freshener alone cannot provide a reasonable suspicion that drugs are present, see United States v. Alvarez, 68 F.3d 1242, 1245 (10th Cir. 1995) (McKay, J., concurring) ("Standing alone, air freshener is not sufficient to justify a reasonable search for drugs."), air freshener coupled with other suspicious circumstances may support further reasonable inquiry. See id. However, the additional circumstance in this case, namely, the fact that neither occupant was the registered owner of the car, is not a sufficient indication of criminal activity. This fact is just as consistent with the innocent explanation that the driver borrowed the car from its rightful owner. See State v. Johnson, 805 P.2d 761, 764 (Utah 1991) (stating "while the lack of a registration certificate and the fact that the occupants did not own the car raised the possibility that the car might be stolen, this information, without more, does not rise to the level of an articulable suspicion that the car was stolen"). Absent more, there was no articulable suspicion that the car had been stolen or that defendants were transporting drugs. Because the smell of air freshener coupled with the fact that neither defendant was the registered owner of the car was insufficient to justify extension of the stop, such detention was unreasonable. Accordingly, we affirm the trial court's suppression ruling. We

do not address the State's remaining arguments because of our holding concerning lack of reasonable articulable suspicion.

Affirmed.

Michael J. Wilkins,
Presiding Judge

WE CONCUR:

Judith M. Billings, Judge

James Z. Davis, Judge

Addendum B

IN THE FOURTH JUDICIAL DISTRICT COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. SAMUEL BRACERO, Defendant.	CASE NUMBER: 971400222/ 97140223 DATED: MARCH 3, 1998
STATE OF UTAH, Plaintiff, vs. ARTURO RUIZ, Defendant.	**RULING** ANTHONY W. SCHOFIELD, JUDGE

This case is before the court on defendants' motions to suppress evidence obtained incident to a traffic stop. Evidence on these motions was received on January 12, 1998. Thereafter the parties submitted their argument on the evidence in writing by post hearing briefs. Having reviewed that evidence and their briefs, I now issue this ruling granting the motions to suppress.

In this case there are three issues to be decided:

a) was the traffic stop proper,

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b) was the detention of Bracero and Ruiz proper, and

c) was the officer justified in searching the defendants' vehicle?

ANALYSIS

a) Was the traffic stop proper?

It is well established that a peace officer is justified in stopping a vehicle when the stop is incident to a traffic violation committed in the officer's presence. See, e.g., State v. Lopez, 873 P.2d 1127 (Utah 1994). In the present case, the defendants' automobile was observed traveling 83 m.p.h. in a 75 m.p.h. zone. The traffic stop for speeding was appropriate.[1]

b) Was the detention of Bracero and Ruiz proper?

Turning now to the defendants' detention subsequent to the traffic stop. It is proper when an officer conducts a traffic stop for an officer to request a driver's license and vehicle registration, conduct a computer check, and issue a citation. See, e.g., State v. Robinson, 797 P.2d 431, 435 (Utah Ct. App. 1990). In this case Trooper Metz approached the window of the vehicle and requested a driver's license and the vehicle registration. Thereafter he returned to his patrol vehicle and conduced a

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[1] Defendants argue in their motion to suppress that the traffic stop was somehow racially motivated because the defendants are Hispanic. The facts surrounding the stop do not support this conclusion. The defendants' car was "painted" with the radar gun long before the officer could have observed that the two individuals in the car were Hispanic. When the defendants' car passed the patrol vehicle at speeds above 75 m.p.h., the driver was wearing military style sun glasses and would not have been easily identifiable as being Hispanic. In this case the patrol car was at mile marker 217 on I-15 and the stop took place at or near mile marker 219, a distance of roughly two miles. This is not enough distance to support the suggestion that the peace officer pulled out, did a "U" turn, accelerated to pursuit speed and tailed the defendants' car for several minutes while observing that the occupants of the car were Hispanic before pulling them over. I discount the claim that the stop was racially motivated or that the defendants had been stopped because the fit some sort of profile.

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computer check from which he learned that Bracero's driver's license was suspended. Neither occupant of the vehicle was properly licensed to drive the vehicle. Thereafter, Metz claims to have observed facts which raised his suspicion as to whether defendants had possession of contraband. At that point he switched from a traffic stop to a drug investigation.

Trooper Metz asserts that the following objective facts supported his decision to seek permission to conduct the search:

a) he smelled a strong odor of air freshener,

b) neither occupant of the vehicle was its registered owner,

c) the plastic panels in the rear of the vehicle had gaps and did not fit properly,

d) there was a map and a cellular telephone in the vehicle,

e) the vehicle was from out of state and was headed to Idaho,

f) both occupants appeared nervous and Ruiz would not make eye contact with the officer, and

g) both occupants had prior criminal histories and the passenger had previously been convicted of drug trafficking.

I am convinced that not all of these facts were available to Trooper Metz when he made the decision to search the vehicle. First, he could not have seen the map and the cell phone when he looked in the car as they were lying in the console between the seats and not easily observable from his view outside the vehicle. Second, when asked on cross, Trooper Metz could not explain which panels were gapped and did not seem properly attached. Third, that the vehicle was from out of state and headed to

Idaho does not evidence criminal activity. The vehicle was on an interstate highway which many, many vehicles use to travel from one state to the another, only traveling through but not staying in Utah. Fourth, the past criminal histories of the two defendants does not establish that either was involved in criminal activity at this time. Fifth, nervousness standing alone is not grounds for a reasonable suspicion of criminal activity. For differing reasons some of us react with much more nervousness than others when in the presence of police officers; and many of those reasons have nothing to do with ongoing criminal activity.

The only facts which I find actually observable by Trooper Metz at the time he made his decision to detain the vehicle and which support that decision are the smell of air freshener and the fact that neither occupant was the registered owner of the car. These are too slim a reed upon which to base the decision to detain the vehicle. That Bracero thereafter consented to the search does not rescue the search as there has been no showing that the detention prior to the search was proper.[2] I am well aware that in evaluating the appropriateness of an investigative stop or detention, I must look at the totality of the circumstances observable to the officer. See United States v. Sokolow, 490 U.S. 411, 417 (1981). While I give credit to the officer because he is out on the front lines in a serious effort to enforce the laws of the State of Utah[3], given all of the

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[2] Trooper Metz claims that Bracero consented to his search of the vehicle while defendants claim that Bracero did not give consent. I need not reach this issue as I conclude that the detention prior to the request for consent to search was improper.

[3] Defendants became quite personal in their closing arguments, attacking both Trooper Metz and his supervisor, Sergeant Paul Mangelson. Though I rule in defendants' favor, I do not adopt that portion of their brief which impugns the integrity of either officer.

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evidence received at the hearing, I am not convinced that the officer had reasonable suspicion of criminal activity sufficient to justify his detention of the defendants past the original traffic stop.

I grant the motions to suppress. Pursuant to Rule 4-504, Utah Code of Judicial Administration, defendants' counsel is directed to prepare an appropriate order.

Recognizing that defendants have been in custody for a significant time on these charges and that Bracero still faces the charges of driving on suspension and speeding, I direct that both defendants be released on their own recognizance and a promise to appear and that the matters be set for further hearing at an appropriate time.

Dated this 3rd day of March, 1998.

BY THE COURT:

Anthony W. Schofield

ANTHONY W. SCHOFIELD, JUDGE

IN THE FOURTH JUDICIAL DISTRICT COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. SAMUEL BRACERO, Defendant.	CASE NUMBER: 971400222/ 97140223 DATED: MAY 22, 1998
STATE OF UTAH, Plaintiff, vs. ARTURO RUIZ, Defendant.	RULING ANTHONY W. SCHOFIELD, JUDGE

This case is before the Court pursuant to Rule 4-501, Utah Code of Judicial Administration, on the State's motion to reconsider.

On March 3, 1998, I issued a ruling granting defendant's motion to suppress evidence obtained incident to a traffic stop. Thereafter, the State filed a motion to reconsider on April 22, 1998, followed by defendant's memorandum in opposition filed on May 11, 1998. Having received and reviewed the memoranda, I deny the State's motion to reconsider.

Pursuant to Rule 4-504, Utah Code of Judicial Administration, the State is directed to prepare an appropriate order.

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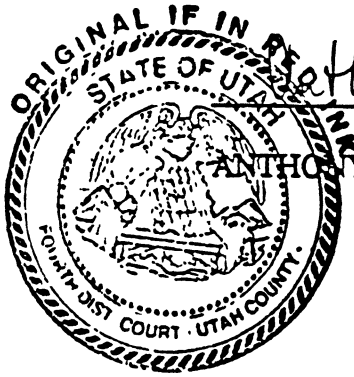
Dated this 22 day of May, 1998.

BY THE COURT:



Anthony W. Schofield

ANTHONY W. SCHOFIELD, JUDGE

IN THE FOURTH JUDICIAL DISTRICT COURT
JUAB COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff, vs. SAMUEL BRACERO ARTURO RUIZ, Defendants.	CASE NUMBER: 971400222/971400223 DATED: AUGUST 14, 1998 **FINDINGS OF FACT AND CONCLUSIONS OF LAW** ANTHONY W. SCHOFIELD, JUDGE

The above entitled matter having come before the above entitled Court on defendants' Motion to Suppress. The State was represented by David O. Leavitt, Juab County Attorney, and the defendants were represented by Jere Reneer, attorney for the defendants. After hearing the evidence and reviewing the memoranda filed by counsel. The Court makes the following:

FINDINGS OF FACT

1. On November 14, 1997, Trooper Hoby Metz of the Utah Highway Patrol, stopped a 1989 Ford Tempo for traveling 83 m..p.h. in a 75 m.p.h. zone.

2. The driver of the vehicle was Samuel Enrique Bracero. Arturo Ruiz was a passenger in the vehicle.

3. Upon approaching the vehicle, Trooper Metz testified he detected a strong odor of air fresheners and could see the air freshener on the console.

4. The defendants were traveling from California and going to Idaho.

5. Trooper Metz returned to his patrol car and conducted criminal history and driver's license requests on the two occupants of the vehicle. Both occupants had prior criminal histories and the passenger previously had been arrested for drug smuggling.

6. The driver had a suspended license. Neither occupant could legally operate the vehicle.

7. The driver and passenger appeared nervous and would not make eye contact with the officer.

8. Because he suspected that driver and passenger were involved in drug trafficking, the officer asked for consent to search the vehicle.

9. The defendants consented to the search.

10. A search of the vehicle revealed 17 packages of marijuana weighing approximately 31 pounds in the side rear panels of the vehicle behind the moldings the officer had observed.

11. At the time the officer asked for permission to search he had certain facts in his mind which he felt justifed continued detention of the defendants. Regarding these facts, I find as follows:

A. Trooper Metz could not have seen the map of cell phone when he looked in the car since they were located between the seat and the console of the car. The map nor cell phone would not by itself be evidence of criminal activity.

B. Trooper Metz explained that the molding in the rear part of the car appeared altered. On cross examination, however, he could not explain which panels were gapped and did not seem properly attached. Thus his recollection of the event was too tenuous upon which to base a continued detention. Ill-fitting molding would not by itself be evidence of criminal activity.

C. An out-of-state car headed to Idaho does not, by itself, evidence criminal activity.

D. The nervousness of the defendants does not justify further detention nor, by itself, is it evidence of criminal activity.

E. The air freshener smell does not justify further detention. The smell of air freshener, by itself, does not evidence criminal activity.

F. The fact that neither occupant of the vehicle was the registered owner does not warrant a detention beyond that of traffic stop nor by itself does it evidence criminal activity.

12. The State filed a Motion to Reconsider based upon *State v. Harmon*, 910 P.2d 1196 (Utah, 1995) and also *State v. Alires*, 960259 CA, (Ut. App. 3-3-98) which held that driving on suspension is an arrestable offense.

13. The Court denied the Motion to Reconsider without comment.

CONCLUSION OF LAW

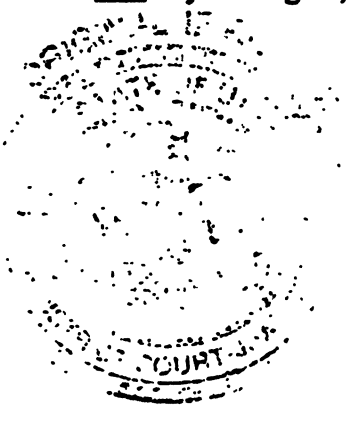
1. The Court finds that the Trooper Metz's initial stop of the vehicle was justified.

2. The officer lacked reasonable suspicion of criminal activity sufficient to justify his detention of the defendants past the original traffic stop.

3. The defendants consented to the search of the vehicle but that search was tainted by the already existing illegal detention.

4. The Court therefore grants the motion to suppress.

Dated this 14 day of August, 1998.



Anthony W. Schofield
ANTHONY W. SCHOFIELD, JUDGE